87-185

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

No._____

ARCHIE WILLIAM PAYNE,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION ON WRIT OF CERTIORARI TO THE COURT OF APPEALS, FIFTH CIRCUIT, NEW ORLEANS, LOUISIANA

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QUESTIONS PRESENTED

1. Whether or not the Court of Appeals for the Fifth Circuit erred in not reversing this case because of the Petitioner's contention that the District Court committed error in sentencing the Petitioner under a statute which was violative of the delegation of powers which was in turn in violation of the Doctrine of Separation of Powers.

2. Whether the Court of Appeals for the Fifth Circuit erred in applying United States Constitutional law in affirming the introduction into evidence the fruits of a search and seizure following the stop of a vehicle and arrest the Petitioner who was driving that vehicle and of which said stop and arrest and search, it is contended by the

Petitioner that it was done without probable cause in violation of the 4th Amendment to the Constitution of the United States.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

No._____

ARCHIE WILLIAM PAYNE, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS,

FIFTH CIRCUIT,

NEW ORLEANS, LOUISIANA

The Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals for the Fifth Circuit in New Orleans, Louisiana, entered on March 19, 1987. (Appendix A) The Petitioner's Petition for Rehearing

in the Court Appeals in the Fifth Circuit in New Orleans, Louisiana, was refused and denied on March 9, 1987. (Appendix B and Appendix C) The Court of Appeals for the Fifth Circuit issued the Mandate in this case on March 19, 1987. The Appeal to the Fifth Circuit was from the Judgment & sentence of the District Court for the Northern District of Texas. (Appendix D)

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals, Fifth Circuit, is not reported and shall not be reported because the Court ordered that the opinion not be published.

JURISDICTION

The Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1). The Petitioner asserted below and asserts here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED RESTATED

1. Whether or not the Court of Appeals for the Fifth Circuit erred in not reversing this case because of the Petitioner's contention that the District Court committed error in sentencing the Petitioner under a statute which was violative of the delegation of powers which was in turn in violation of the Doctrine of Separation of Powers.

2. Whether the Court of Appeals for the Fifth Circuit erred in applying United States Constitutional law in affirming the introduction into evidence the fruits of a search and seizure following the stop of a vehicle and arrest the Petitioner who was driving that vehicle and of which said stop and arrest and search, it is contended by the Petitioner that it was done without probable cause in violation of the 4th

Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Constitutional Doctrine of Separation of Powers.

2. This case involves the 4th Amendment to the Constitution of the United States.

STATEMENTS OF THE CASE

On February 6, 1986, Officer James McRobbie of the Arlington Police Department was involved in the surveillance of an Archie William Payne, the Petitioner, at the Sheraton Center Park Hotel at the direction of Detective Charles Cassity. A confidential informant, a hotel bellboy, had told these law enforcement officer, but not

McRobbie, that he had seen marijuana and syringes in room 923 of the hotel. This room belonged to the Petitioner. Based on this information Detective Cassity was in the process of securing a search warrant. The Search Warrant was issued for room 923 only after the stop, arrest and search of the Petitioner and his vehicle. The search took place after the Petitioner was in custody.

Officer McRobbie was instructed by Detective Cassity to stop Archie William Payne in the event he tried to leave the hotel. Officer Cassity was attempting to obtain a search warrant for room #923 based on information received from hotel personnel. Officer McRobbie was informed at the direction of fellow officers at the surveillance scene that Archie William Payne was leaving the hotel and was directed to his vehicle at that time.

In accordance to his instructions, he made the stop, identified the passengers and commenced to search the vehicle. Officer McRobbie also made an investigation of the inspection sticker which he felt had been altered. Mr. Payne was subsequently arrested for displaying a fictitious inspection sticker. This offense is a Class C misdemeanor or traffic violation for which a citation is usually issued. A passenger, Christie Heflin, in the vehicle was also arrested on traffic warrants out the of City of South Lake, Texas.

Officer McRobbie admitted that he stopped the Petitioner's vehicle because of his instructions from Detective Cassity. Regardless of the traffic violations he would and did stop the vehicle because Cassity wanted it stopped. The traffic violations were

there but were not controlling because he had his instructions.

According to Officer McRobbie's testimony, after placing both occupants of the vehicle under arrest and impounding the vehicle, he saw a gun between the seat and the center console inside the automobile. At this point, Officer McRobbie and Officer Harris conducted a search of the vehicle at the scene of the arrest. The search disclosed the following items:

1) 4.34 lbs (1,942.3 grams of amphetamines) in a duffel bag,

2) $900.00 in cash,

3) $21,000 in cash in a brushed aluminum briefcase,

4) Syringes

5) A gun.

REASONS FOR GRANTING THE WRIT

1. Issue of Separation of Powers

The Petitioner contends that there is a conflict between the decisions of the Court of Appeals for the Fifth Circuit and of the United States Supreme Court. In this case the Appellant was sentenced to ten years incarceration. Such a sentence was possible because the controlled substance at issue, amphetamines, was moved or transferred from Schedule III to Schedule II and thus raised the possible punishment from the maximum of five years to fifteen years. 21 U.S.C. 811; 21 U.S.C 812; 21 U.S.C. 841; 21 CFR 1308; 28 CFR 0.100. The movement or transfer was accomplished by the Administrator of the Drug Enforcement Administration (DEA) as provided by the above statutes. Congress on October 12, 1984, after the transfer by DEA, which

occurred on October 10, 1984, also changed the scheduling and listing of other drugs. 21 CFR, Ch. II Sec. 1308.11 through Sec. 1308.13. One of the controlled substances listed by the DEA is "coca leaves." 21 CFR, Ch. II Sec. 1308.12 (b) (4). Congress amended the Controlled Substances Act as related on October 12, 1984, and redefined in such amendment was "coca leaves" and at the same time Congress left alone other schedules and these remain unchanged from the original enactment. 21 U.S.C. 12 (pocket parts). Thus Congress reenacted the schedules relating to amphetamines leaving such undisturbed in Schedule III. It is contended that Congress expressly superseded all previous alterations made by DEA by such re-enactment except those to which Congress clearly redefined and amended.

The DEA change or alteration took place before the re-enactment by Congress. This re-enactment should overrule such provisions, changes and alterations made by the said DEA. This act by Congress not enacting the changes, alterations and amendments made by DEA may serve as a safeguard or a veto provision of the legislative power delegated to DEA. Whereas Congress may have delegated power to DEA under certain guidelines a safeguard provision was not provided in the same legislation. It is suggested and the Petitioner contends that such Delegation of Power without safeguards would be and is violative of the Doctrine of Separation of Powers.

The Court of Appeals for the Fifth Circuit has previously held that the Delegation of Power to DEA to schedule drugs was constitutionally permissible and not violative of the Doctrine of

Separation of Powers. United States v. Gordon, 580 F.2nd 827 Cir., 1978). The Petitioner contents that this decision by the Court of Appeals is now in conflict with the most recent decisions by the United States Supreme Court. Bowher v. Synar, 478 U.S.____, 92 L.Ed.2d 583, 106 S.Ct _____ (1986) held that the Doctrine of Separation of Powers continues as a viable law and when done in certain fashion is unconstitutional. Also in INS v. Chadha, 462 U.S. 919, 77 L.Ed.2d 317, 103 S.Ct. 2764 (1983) as well as in Bowher v. Synar, supra, this Court has held that when Congress delegates power but retains the ultimate authority to execute executive functions by power of removal of the officer performing the function, it is unconstitutional and violative of the Separation of Powers

Doctrine. In this case Congress does not have the removal power of the executive officer, the DEA Administrator, but Congress has not provided a safeguard against unbridled delegation of power. More recent legislation authorizes law making authority in a Delegation of Power manner and then provides Congress with a safeguard, that is a vote by each House whether or not to accept or reject the legislation. This was seen in the very recent act of the Pay Commission giving all the members of Congress a payraise and that payraise was the subject to a vote of acceptance or rejection. That particular vote in each House of Congress provides a safeguard which is not part of the legislation giving the DEA Administrator the authority to reschedule drugs. It is contended by the Petitioner that because no procedural safeguards are provided that this is violative of

Separation of Powers Doctrine and equal protection under the United States Constitution.

Yet more recent is the legislation concerning sentencing in the Federal Courts. The United States Sentencing Commission was created by Congress to promgate law to be executed by Federal District Judges in sentencing. The entire package of guidelines becomes effective if Congress at the end of a six month period, which commenced on April 13, 1987, takes no contrary action. 40 CrL 3001, et seq, (10-1-86), 28 U.S.C. Sec. 991, et seq. In the recent sentencing delegation of power, Congress has retained the safeguard of accepting or rejecting the legislation by a vote by either house. Because the safeguard mechanism is not provided in to the DEA delegation of power this DEA

legislation may be in conflict with the Doctrine of Separation of Powers and equal protection.

2. Issue on the Search and 4th Amendment.

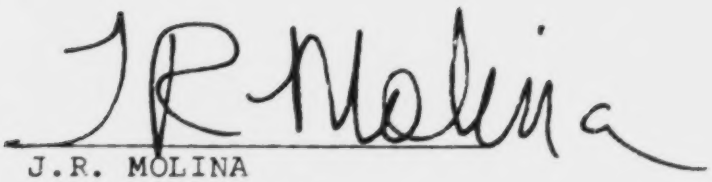
The Petitioner contends that the Court of Appeals for the Fifth Circuit is in conflict with one of its prior decisions. That is that the decision in this case is in conflict with Amador-Gonzales v. United States, 391 F.2nd 308 (Fifth Circuit 1968). The Fifth Circuit held in Amador - Gonzalez, supra, that a stop, arrest and search of an individual and the vehicle he was driving if based upon a pretext traffic stop was on violative of the 4th Amendment. In the instant case the evidence showed that the stopping officer, McRobbie, stopped this vehicle on instructions from one Detective Cassity. McRobbie testified that his instructions were to stop the

vehicle and was in the process of doing so when the traffic violations developed but not withstanding such violations his intent was to stop the vehicle because of his prior instructions from Cassity. The Petitioner is suggesting that the traffic violation's were a pretext or bootstrapping for probable cause.

In the alternative the Petitioner contends that there was no probable cause for the initial stop. More simply stated, the Petitioner contends that the facts of the case, surveillance et al, did not rise to the level of probable cause to authorize the initial stop. The facts leading to the initial stop and arrest and search are set out in the statement of the case of this petition.

CONCLUSION

Petitioner prays that the Petition for Writ of Certiorari be granted.



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Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1451

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

ARCHIE WILLIAM PAYNE,
Defendant-Appellant

Appeals from the United States District Court for the Northern District of Texas.

(CR-4-86-37)

(February 9, 1987)

Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

Defendant appeals his conviction for possession of amphetamine with intent to distribute on the grounds that the

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

evidence supporting his conviction was the product of an unreasonable search and seizure and that his sentence was promulgated by the government's executive branch rather than the legislative branch, rendering the sentence unconstitutional as a violation of the separation of powers doctrine. We affirm the judgment of the district court.

I.

On February 6, 1986, Officer Charles Cassity of the Arlington, Texas Police Department was told that a bellhop had seen marijuana and several syringes in a hotel room occupied by defendant Archie William Payne. Cassity knew that Payne was currently under investigation for narcotics trafficking, and went to the hotel to investigate. Cassity discovered that the room identified by the bellhop was rented by Payne and occupied by Payne and an unidentified female. In his

interview with the bellhop, Cassity learned that the bellhop knew Payne, and was a local resident with no criminal history or convictions of any kind.

Cassity then left the hotel to secure a search warrant, leaving Officer Long in an adjacent room for surveillance. Cassity also had a marked patrol unit dispatched to the hotel in case Payne and the woman should leave. Officer Long heard someone leave the hotel room, and followed the footsteps down to the parking lot, where he saw Payne and the woman step into a white Corvette and leave the hotel. Officer McRobbie, the officer stationed in the marked patrol car outside the hotel, was directed to stop the vehicle.

Officer McRobbie followed the car for a short distance before stopping it. Approaching the car, McRobbie noticed

that the inspection sticker appeared to have been tampered with and that there was no front license plate. McRobbie asked the car's occupants for identification, and requested Payne to step out of the car so that he could more closely examine the inspection sticker. McRobbie concluded that the inspection sticker had been altered. In the meantime, a check on the suspects' identification revealed an outstanding misdemeanor warrant from the Southlake Police Department on the woman. The woman, Christie Glen Heflin, was then ordered out of the car and arrested. McRobbie's assisting officer found some marijuana on her person. McRobbie arrested Payne for the expired inspection sticker. After Payne and Helfin had exited the car, McRobbie noticed a handgun, a large amount of cash, and several syringes between the seat and the

center console. Payne and Heflin were then placed under arrest for the additional offense of unlawfully carrying a weapon. Officer McRobbie thereafter conducted a warrantless search of the vehicle and discovered the following items:

(a) 1,942.3 grams (4.34 lbs.) of amphetamine in a duffel bag;

(b) $900.00 in cash between the seat and the center console;

(c) $21,000.00 in cash in a brushed aluminum briefcase;

(d) plastic syringes; and

(e) a handgun.

Payne was indicted on one count of possession of amphetamine with intent to distribute, in violation of 21 U.S.C. 841 (a) (1), and aiding and abetting said crime, in violation of 18 U.S.C. 2. Payne moved to suppress all the evidence

found in the car as the fruit of an illegal search. After an evidentiary hearing, the district court denied the motion. Payne pled guilty to the charge reserving his right to appeal the denial of his motion to suppress.

On appeal Payne raised three points of error. First, he argues that the search of his car was illegal. The second and third points of error derive from the transfer of amphetamine from a Schedule III controlled substance to a Schedule II controlled substance, authorized by the administrator of the Drug Enforcement Agency according to his power under 21 U.S.C. 811. Pursuant to this DEA action, Payne received a ten year sentence for possession with intent to distribute a Schedule II controlled substance, whereas he otherwise would have been subject to a maximum of five

years of imprisonment for possession of a Schedule III substance. Payne argues that the DEA's action was unconstitutional, as both a violation of the separation of powers to the doctrine and an unconstitutional delegation of legislative power to the executive branch.

We affirm the judgment of the district court.

II.

The Supreme Court has recognized three tiers of police-citizen encounters for the purposes of fourth amendment analysis: "communication between police and citizens involving no coercion or detention and therefore without the compass of the Fourth Amendment, brief 'seizures' that must be supported by reasonable suspicion, and full-scale arrests that must be supported by

probable cause." United States v. Berry, 670 F.2d 583, 591 (5th Cir. Unit B 1982) (en banc); United States v. Hanson, 801 F.2d 757, 760-61 (5th Cir.1986). The facts of the instant case implicate the latter two of these tiers. McRobbie's initial investigative stop of Payne's car must be justified by reasonable suspicion, and the subsequent arrest of Payne and seizure of the incriminating evidence must be supported by probable cause.

It is clear that "stopping a car and detaining its occupants constitute a seizure within the meaning of the Fourth Amendment." United States v. Hensley, 469 U.S. 221, 226 (1985). Police may nonetheless stop persons in the absence of probable cause under limited circumstances. Id.; see Terry v. Ohio, 392 U.S. 1 (1986). "[T]he governmental interest in investigating an officer's

reasonable suspicion, based on specific and articulable facts, may outweigh the Fourth Amendment interest of the driver and passengers in remaining secure from the intrusion." Hensley, 469 U.S. at 226. Critical to any finding of reasonable suspicion is an evaluation of "the reasonableness of a particular search or seizure in light of the particular circumstances" present at the time of the stop. Terry, 392 U.S. at 21. Moreover, "the suspicion must be focused on the particular individual seized." Berry, 670 F2d at 600.

McRobbie clearly had a "reasonable suspicion" sufficient to justify his investigatory stop of Payne's vehicle. McRobbie knew that Payne had for some time been the subject of local narcotics investigations, and also knew that an informant had very recently seen Payne in

possession of controlled substances and syringes. We note that his same information was evaluated by a local magistrate as sufficient to support the issuance of a search warrant for the hotel room; that is, the magistrate found this information sufficient to establish probable cause. it was certainly sufficient to justify a "reasonable suspicion" in McRobbie's mind that the car's occupants were engaged in criminal activity. The initial investigative stop of the vehicle was justified.

We now turn to the question of whether McRobbie had probable cause to arrest Payne and search the car. Probable cause for arrest is present "when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonable trustworthy information are sufficient in themselves to warrant in a person of

reasonable caution the belief that an offense has been or is being committed." United States v. Woolery, 670 F.2d 513, 515 (5th Cir.), cert denied, 459 U.S. 835 (1982).

McRobbie's careful personal examination of the inspection sticker was sufficient to reasonably create in the officer's mind a belief that a violation of the relevant state traffic laws was being committed. Tex. Rev. Stat. Ann. art. 6701d 140(g) (Vernon Supp. 1987) ("Any person operating a vehicle on the highways of this State. . . without displaying a valid inspection certificate . . . is guilty of a misdemeanor"); see also id. 153 (Vernon 1977) ("Any peace officer is authorized to arrest without warrant any person found committing a violation of any provision of this Act."). McRobbie's examination of the

sticker gave him probable cause to arrest Payne.

The "automobile exception" to the fourth amendment's warrant requirement applies only when "there are both exigent circumstances and probable cause to believe that the vehicle in question contains property that the government may properly seize." United States v Reyes, 792 F.2d 536, 538 (5th Cir.), cert denied, 107 S. Ct. 191 (1986). The outstanding warrant on Heflin gave the officer probable cause to arrest her and conduct a custodial "pat down" of her person. The marijuana found on her person demonstrated that the car had been used to transport a controlled substance. See United States v Maldonado, 735 F.2d 809, 816 (5th Cir. 1984) ("The officers' discovery of the methadone on Alvarado, who had just gotten out of the car, showed that the car had been used to

transport a controlled substance."). In view of this circumstances, coupled with the syringes, gun, and loose cash in plain view between the seats, the officer had probable cause to search the vehicle for controlled substances. In the instant case, the mobility of the vehicle, combined with its potential for flight and for the secreting of evidence, supply the necessary exigent circumstances. See United States v Head, 693 F.2d 353, 357 (5th Cir. 1982). The officer's search of the vehicle was justified.

III.

Payne invites us to reconsider our opinion in United States v. Gordon, 580 F.2d 827 (5th Cir.), cert. denied, 439 U.S. 1051 (1978) in light of the Supreme Court's recent decision in Bowsher v. Synar, 106 S. Ct. 3181 (1986). In

Gordon, this court carefully reviewed the validity of 21 U.S.C. 811's authorization of the Attorney General to schedule, transfer between schedules, or remove any drug or substance from a schedule in accordance with statutory procedures and criteria. See 580 F.2d at 837-41. Gordon found that section 811 neither violated the separation of powers doctrine nor constituted an unauthorized delegation of legislative power. See id. Our reading of Bowsher, which addresses the problem of legislative encroachment upon the executive branch rather than the inverse situation presented by Payne's argument, has not convinced us that Gordon's holding was overturned. Contrary to Payne's implication, Gordon did not refuse to recognize the separation of powers doctrine as "viable law." Instead, Gordon was decided according to

the doctrine's well established exception "that a delegate may formulate rules for violation of which the statute itself provides penalties impossible by judicial process." Gordon, 580 F.2d at 840 (citing, inter alia, Avent v United States, 266 U.S. 127 (1924)). The district court did not err in imposing the higher sentence authorized by the classification of amphetamine as a Schedule II controlled substance.

IV.

For the reason set out above, the conviction is AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 86-1451

Summary Calendar

D.C. Docket No. CR-4-86-37

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ARCHIE WILLIAM PAYNE,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Texas

Before RUBIN, RANDALL, AND HIGGINBOTHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that the defendant-appellant pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

February 9, 1987

ISSUED AS MANDATE: March 19. 1987

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1451

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

ARCHIE WILLIAM PAYNE,

Defendant- Appellant

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(March 9, 1987)

Before RUBIN, RANDALL AND HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ United States Circuit Judge

Appendix D

United States of America

THE
NORTHERN
DISTRICT
OF TEXAS
FORT WORTH
DIVISION

Defendant Archie William Payne

Docket No. CR4-86-37

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: June 20. 1986

Counsel	with Counsel J.R. Molina, Retd Defendant's Address: C/O Charles William Payne 180 E. Ritter St. Seven Mile, Ohio 45062

Plea	Guilty, and the Court being satisfied that there is a factual for the plea. There being a finding of GUILTY.
Finding & Judgment	Defendant has been convicted as charged of the offense(s) of Possession with intent to distribute Amphetamine in violation of Title 21, U.S.C., Section 841 (a) (1) Offense committed: on or about February 6, 1987
Sentence or Probation Order	The Court asked whether defendant had anything to say why judgment should not be pronounced because no sufficient cause to the contrary was shown or

appeared to the court. The Court adjudged the defendant guilty as charged and convicted and ordered that the defednant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years plus a special parole term of five (5) years.

IT IS FURTHER ORDERED said sentence is subject to the provisions Probation Title 18, United States Code Section 4205 (b) (2), hereby defendant may become eligible for Parole as the Parole Commission may determine.

IT IS ALSO ORDERED that

Special Condition of Probation	defendant pay a mandatory special assessment of Fifty Dollars ($50.00) Defendant shall recieve full credit for time spent in custody awaiting the disposition of this matter.
Additional of Probation	In addition to the special conditions probation imposed above, it is hereby ordered that of the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the condition of probation, reduce or extend the period of probation and at any time during the probation period or within a maximum probation period of five years

	permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.
Committ-ment Recommen-dation	The Court orders committment to the custody of the Attorney General and recommends: F.C.I., Bastrop, Texas and court also recommends that defendant participate in a drug counseling program and receive treatment for his drug problem.

Signed by
U.S. District Judge

/s/Eldon B. Mahon

Date: June 20, 1986